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Tee Yee Sein v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO B-05(M)-20–01 OF 2016
AHMADI ASNAWI, IDRUS HARUN AND KAMARDIN HASHIM JJCA
25 JUNE 2018

C *Criminal Procedure — Appeal — Appeal against conviction and sentence — Accused person convicted for murder — Whether circumstantial evidence relied upon by prosecution conclusive — Whether trial judge appreciated difference between mixed DNA profile and full DNA profile — Whether there was misdirection on investigation of alibi — Whether oral evidence of fingerprint expert consistent with his written report — Whether conviction and sentence safe — Penal Code s 302*

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The appellant was charged for the offence of murder under s 302 of the Penal Code. The deceased's body was found dead in her car located near her office by her boss ('SP6'). The deceased's husband ('SP5') stated that the deceased's two mobile phones, wrist watch, credit cards, ATM card, identification card and driving license were missing/lost. The police arrested an employee of Kedai Emas Wan Xing ('SP4') which was in the business of selling and buying gold items and used handphones. SP4 testified that the appellant came to his shop to sell a phone belonging to the deceased. This led to the arrest of the appellant. The police also seized the deceased's other phone. The investigation also found the presence of the appellant's DNA profile on the deceased's fingernails and the appellant's fingerprint on the driver's seat window of the deceased's motorcar. Satisfied that the prosecution had established a prima facie case, the appellant was called to enter his defence. In his defence, the appellant submitted that: (a) on the said day, he was at home; and (b) he had bought the handphones. The High Court judge found that the appellant failed to raise a reasonable doubt on the prosecution's case. The appellant was convicted of the charge and sentenced to death. Hence, the present appeal on the grounds that: (i) there was inconclusiveness of the circumstantial evidence relied by the prosecution; (ii) there was failure to appreciate the difference between mixed DNA profile and full DNA profile; (iii) there was failure to investigate the appellant's alibi; (iv) the oral evidence of the fingerprint expert ('SP18') was contradicted by his own written report ('exh D52'); and (v) whether the injuries, though fatal, would, in the ordinary course of nature, be sufficient to cause the death of the deceased.

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Held, dismissing the appeal:

(1) The presence of the appellant's fingerprint on the outside of the driver's side door window of the deceased motorcar, inter alia, showed that the deceased was verily at the scene of the crime. This raised the irresistible inference and conclusion that the appellant had indeed accosted, engaged and struggled with the deceased and finally ended the deceased's life, before escaping with the deceased's valuables. The cumulative effect of the circumstantial evidence adduced led to the irresistible conclusion that it was the appellant who had murdered the deceased (see paras 43–44).

(2) The DNA profiles of 'Individual 1' and 'Male 1', which were developed from the said comforter and blanket had no relevance and weightage at all upon the culpability or otherwise of the appellant in the commission of the offence preferred against him as the said articles were not seized from the crime scene but from the apartment belonging to the appellant's wife (see para 54).

(3) The appellant invented characters to show that he was not at the scene of the crime at the material time. The appellant's defence did not cast any reasonable doubt on the prosecution's case (see paras 72–73).

(4) SP18 offered a reasonable explanation on the anomaly in his report. Mistakes could happen to any witness, even one with tons of experience. There was no reason to reject the same (see para 80).

(5) The acts by the appellant indicated that the appellant had no other intention but to murder the deceased, an act which was well within the ambit of s 300(a) of the Penal Code. The defence failed to raise a reasonable doubt on the prosecution's case and the prosecution had proven its case beyond reasonable doubt (see paras 96 & 102).

[Bahasa Malaysia summary

Perayu didakwa atas kesalahan membunuh bawah s 302 Kanun Keseksaan. Mayat si mati itu dijumpai di dalam keretanya yang terletak berhampiran pejabatnya, oleh bosnya ('SP6'). Suami si mati ('SP5') menyatakan bahawa dua telefon bimbit, jam tangan, kad kredit, kad ATM, kad pengenalan dan lesen memandu si mati telah hilang. Pihak polis menahan seorang pekerja Kedai Emas Wan Xing ('SP4') yang menjalankan perniagaan menjual dan membeli barangan emas dan menggunakan telefon bimbit. SP4 memberi keterangan bahawa perayu datang ke kedainya untuk menjual telefon milik si mati. Ini membawa kepada penangkapan perayu. Polis juga merampas telefon lain si mati. Siasatan juga mendapati kehadiran profil DNA perayu pada kuku-kuku si mati dan cap jari perayu di tingkap kerusi pemandu kereta si mati. Berpuas hati bahawa pihak pendakwaan membuktikan kes prima facie, perayu dipanggil membela diri. Dalam pembelaannya, perayu menghujahkan: (a) pada hari tersebut, dia berada di rumah; dan (b) dia telah membeli telefon bimbit tersebut. Hakim Mahkamah Tinggi mendapati bahawa perayu gagal menimbulkan keraguan munasabah terhadap kes pendakwaan. Perayu telah

disabitkan atas pertuduhan dan dijatuhkan hukuman mati. Oleh itu, rayuan ini atas alasan bahawa: (i) tiada kemuktamadan keterangan ikut keadaan oleh pihak pendakwaan; (ii) terdapat kegagalan mempertimbangkan perbezaan antara profil DNA campuran dan profil DNA penuh; (iii) terdapat kegagalan menyiasat alibi perayu; (iv) keterangan lisan pakar cap jari ('SP18') bercanggah dengan laporan bertulisnya sendiri ('eksh D52'); dan (v) sama ada kecederaan, walaupun membawa maut, akan, semula jadinya, cukup untuk menyebabkan kematian si mati.

Diputuskan, menolak rayuan:

(1) Kehadiran cap jari perayu di luar tingkap pintu sisi pemandu kereta si mati, antara lain, menunjukkan bahawa si mati berada di tempat kejadian. Ini menimbulkan inferens dan kesimpulan yang tidak dapat dinafikan bahawa perayu sebenarnya menyerang, terlibat dan bergelut dengan si mati dan akhirnya mengakhiri kehidupan si mati, sebelum melarikan diri dengan harta benda si mati. Kesan kumulatif yang dikemukakan oleh keterangan ikut keadaan membawa kepada kesimpulan yang tidak dapat dinafikan bahawa perayu yang membunuh si mati (lihat perenggan 43–44).

(2) Profil DNA 'Individual 1' dan 'Male 1', yang diperoleh dari 'comforter' dan selimut tersebut tidak mempunyai kaitan dan pemberatan sama sekali atas kebersalahan, atau sebaliknya, perayu dalam melakukan kesalahan yang dituduh terhadapnya kerana item-item ini tidak disita dari tempat kejadian tetapi dari pangsapuri yang dimiliki oleh isteri perayu (lihat perenggan 54).

(3) Perayu mencipta watak-watak untuk menunjukkan bahawa dia tidak berada di tempat kejadian jenayah berlaku pada masa material. Pembelaan perayu tidak membangkitkan sebarang keraguan munasabah terhadap kes pendakwaan (lihat perenggan 72–73).

(4) SP18 mengemukakan penjelasan yang munasabah mengenai kecacatan dalam laporannya. Kesalahan boleh berlaku pada mana-mana saksi, walaupun seorang yang mempunyai banyak pengalaman. Tiada sebab menolak keterangan ini (lihat perenggan 80).

(5) Tindakan perayu menunjukkan bahawa perayu tidak mempunyai niat lain selain membunuh si mati, satu perbuatan bawah lingkungan s 300(a) Kanun Keseksaan. Pembelaan gagal menimbulkan keraguan munasabah terhadap kes pendakwaan dan pihak pendakwaan telah membuktikan kesnya melampaui keraguan munasabah (lihat perenggan 96 & 102).]

Notes

For cases on appeal against conviction and sentence, see 5(1) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 321–500.

Cases referred to

Ahmad Najib bin Aris v PP [2009] 2 MLJ 613; [2009] 2 CLJ 800, FC (refd)
Amathevelli a/p P Ramasamy v PP [2009] 2 MLJ 367, FC (refd)
Cheong Kam Kuen v PP [2013] 1 MLJ 15; [2013] 2 MLRA 1, FC (refd)
Duis Akim & Ors v PP [2014] 1 MLJ 49; [2013] 9 CLJ 692, FC (folld)
Jayaraman & Ors v PP [1982] 2 MLJ 273 (refd)
Mohamed Mokhtar v PP [1972] 1 MLJ 122 (refd)
PP v Azilah bin Hadri & Anor [2015] 1 MLJ 617; [2015] 1 CLJ 579, FC (refd)
Sunny Ang v PP [1966] 2 MLJ 195, FC (refd)
Tan Buck Tee v PP [1961] 1 MLJ 176, CA (refd)

Legislation referred to

Courts of Judicature Act 1964 s 60
Criminal Procedure Code s 399(1)
Evidence Act 1950 s 114(a), (g)
Penal Code s 300, 300(a), (c)

Appeal from: Criminal Trial No 45B-282–12 of 2012 (High Court, Shah Alam)

Chong Joo Tian (JT Chong Assoc) for the appellant.
Ku Hayati bt Ku Haron (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Ahmadi Asnawi JCA:

[1] In the court below, the appellant was convicted and sentenced to death upon the following charge levelled against him:

> Bahawa kamu pada 3.2.2012 antara jam lebih kurang 8.00 malam hingga 11.15 malam, di tempat letak kereta awam berdekatan dengan Jalan SP2/6, Taman Serdang Perdana, Serdang Perdana, di dalam Daerah Petaling Jaya, di dalam Negeri Selangor Darul Ehsan, telah membunuh seorang perempuan bernama Goh Chew Peng (No K/P: 730926-04- 5064) dan oleh yang demikian kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 302 Kanun Keseksaan.

[2] Being dissatisfied with the impugned decision, the appellant appealed to this court. Hence this appeal before us.

[3] After due consideration of the issues raised, we dismissed the appeal. We now give our grounds.

A THE CASE FOR THE PROSECUTION

[4] SP5 (Cheng Seong Foo) was the husband of the deceased. The deceased was an office worker, who had SP6 (Hee Kim Fah) as her boss.

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[5] SP5 testified that on the day of the incident (3 February 2012), both he and the deceased had made an arrangement to go out to have dinner with their children.

C **[6]** SP5 further testified that he received the last telephone call from the deceased at about 8pm while she was still in her office requesting him to get their children ready for dinner.

[7] By 9pm, the deceased had yet to arrive home.

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[8] Being concerned with the deceased's failure to come home at the appointed time, SP5 went out to look for the deceased. He searched within the vicinity of her workplace but failed to locate her.

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[9] SP5 then proceeded to SP6's house and met SP6 for assistance.

[10] SP6 in turn contacted the deceased's co-worker, SB2 (Teoh Geok Chin), who told him that the deceased had left the office at around 8pm. SP6 F then advised SP5 to go home to be with his children whilst he proceeded to try to find the deceased.

[11] SP6's investigation led him to the car park located near the office ('the crime scene'). He found the deceased's car therein and upon looking into the G car through the driver's seat window, saw the deceased seated at the front passenger seat in a reclining position, appearing to be asleep. He called out the deceased's name several times while at the same time knocking on the car window. However, the deceased was unresponsive.

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[12] SP6 then went to the front passenger side and opened the car door. He found the deceased unconscious, her palms to be cold and smelt blood. SP6 then contacted the police and informed SP5 of his discovery.

I **[13]** SP2 (Mohd Ariff bin Harun) from Bahagian Pencegahan Jenayah, Balai Polis Seri Kembangan and SP3 (L/Kpl Mohd Husnayri bin Rahim) from the same *balai polis*, arrived at the scene soon after in separate vehicles. They found the deceased pretty much covered in blood as seen in the photographs at pp 11–34 of *Jld* 3A *rekod rayuan* ('RR').

[14] SP5, in his police report, inter alia, stated that the deceased's two mobile telephones, wrist watch (Tag Heuer Aquaracen Quarts), three credit cards, one ATM card and the deceased's NRIC and driving license were missing/lost.

[15] On 10 February 2012, the police arrested SP4 (Ching Giok Cheng), an employee of Kedai Emas Wan Xing, who was in the business of selling and buying gold items and used handphones. He said that the appellant had come to his shop on 6 February 2012 to sell one iPhone 4S (IMEI: 013441001169142), later identified by SP5 as one of the set belonging to the deceased's, and he had agreed to purchase the same for RM1000. SP4 had also issued a cash bill (exh P7) to the appellant to signify the said purchase.

[16] At about 7.10pm on 21 February 2012, the appellant was arrested by the police. The police also seized one LG New Chocolate handphone (IMEI: 356548–03–580785–6) from the appellant. SP5 also identified this handphone as the other handphone belonging to the deceased's.

[17] The investigation also revealed the presence of the appellant's DNA profile on the deceased's fingernails and the appellant's fingerprint on the driver's seat window of the deceased's motorcar.

[18] The pathologist, SP16 (Dr Khairul Anuar bin Zainun), found 31 marks of injuries on the deceased. His post mortem report is exh P75, found at pp 176–182, *Jld* 3B, *RR*.

[19] SP16 also testified that the stab wound caused to the left neck of the deceased was inflicted with an object with one sharp end and one blunt end and could have been caused by an object such as a knife. He said that this wound which was 3cm in depth had penetrated the underlying subcutaneous tissues cutting through the sternocleidomastoid muscle and transacted the internal jugular vein of the neck and causing severe bleeding. He also said that this injury was fatal in nature and in his opinion the cause of death was due to stab wound and compression to the neck.

[20] The learned trial judge discussed at length (at pp 29–40, *Jld* 1, *RR*) the various evidence incriminating the appellant with the murder of the deceased and at the end of the day, found that from all the evidence adduced by the prosecution, and after conducting a maximum evaluation of the evidence, the prosecution had succeeded in proving a prima facie case against the appellant. The appellant was henceforth ordered to enter his defence.

THE DEFENCE'S CASE

[21] The appellant gave evidence on oath.

[22] The appellant testified that he was not at the scene of the crime on the day the deceased was found murdered (3 February 2012) but was at home from the time he woke up at about 11am.

[23] At about 1pm he went out to purchase some vegetables and went back home thereafter and remained therein until 8.30pm.

[24] Then he went out to meet a friend, one Ah Meng, at a massage parlour at Pinggiran Putera. He had attempted to sell alcoholic health drinks to Ah Meng.

[25] The appellant further said that he reached Pinggiran Putera at about 9pm and met Ah Meng for about 15 minutes.

[26] Next, the appellant went to Jalan Alor, Bukit Bintang, to a Thai restaurant to meet a Thai lady, one 'Pi', also to sell alcoholic health drinks.

[27] The appellant further testified that he had bought the LG Chocolate handphone, found on him at the time of his arrest and the iPhone 4S handphone for RM700 on 5 February 2012 from a male Malay whom he had never met before.

[28] SB2, the deceased's office colleague, testified that she saw the deceased waving good bye to her colleagues just before the deceased left the office on 3 February 2012.

[29] SB2 also testified that she too had parked her car in the same car park as the deceased. When she left the office and reached her car, she noticed that the deceased's car was still there. She drove off quickly as it was raining at the material time and the surroundings were dark.

[30] At the end of the defence's case, the learned trial judge found that the appellant had failed to raise a reasonable doubt upon the prosecution's case and that the prosecution had proved its case beyond a reasonable doubt. The appellant was found guilty without more and convicted of the offence preferred against him and was sentenced to death.

THE APPEAL

[31] The appellant had canvassed the following grounds:

(a) the circumstantial evidence relied by the prosecution, taken cumulatively does not lead to the irresistible conclusion that it was the appellant who had murdered the deceased;

(b) the learned trial judge had failed to appreciate the difference between mixed DNA profile as compared with a full DNA profile for the purpose of implicating the appellant;

(c) the learned trial judge had misdirected himself when he found that the investigating officer ('SP17') did not investigate the alibi of appellant when in fact it was investigated by another officer;

(d) the oral evidence of the fingerprint expert, the Penolong Pendaftar Penjenayah, Puwira Jaya bin Othman ('SP18'), was contradicted by his own written report; and

(e) there was no evidence from the pathologist ('SP16') whether the injuries suffered by the deceased though fatal, would in the ordinary course of nature sufficient to cause the death of the deceased.

OUR DECISION

Ground (i) — Inconclusiveness of the circumstantial evidence relied by the prosecution

[32] Learned counsel submitted that three fingerprint impressions were lifted from the following locations of the deceased's motorcar:

(i) the fingerprint marked 'AO' on the outside of the driver's side door window, which matched the appellant's fingerprint;

(ii) the palm prints 'A2' and 'A4' found inside the vehicle on the window of the passenger seat directly behind the deceased, belonging to an unknown person; and

(iii) fingerprint 'A3' found inside the vehicle on the window of the passenger seat behind the deceased, also belonging to an unknown person.

[33] Learned counsel submitted that the fingerprint impressions enumerated in sub-paras (ii) and (iii) above, show the inconclusiveness of the circumstantial evidence as the presence of the same (fingerprints of unknown persons) could very well point to another person being the real killer of the deceased. These had created a reasonable doubt upon the prosecution's case.

[34] However, in our judgment it is wrong to treat these fingerprint evidence in isolation. It has to be considered together with the other evidence adduced before the court as by its very nature, one of the points of circumstantial evidence is the cumulative effect of adding all the evidence together and considering them together and not individually in isolation and thereafter consider its net effect whether it would or would not lead to the irresistible inference and conclusion that it was the appellant who had intentionally caused the death of the deceased.

[35] Now, we have the evidence of SP4 who was arrested together with her employer, Goh Chee Ban, of Wan Xing Jewellers Store, Klang, by SP13 (Insp Mohd Sukiman). SP13 had then recovered the handphone iPhone 4S (IMEI: 013441001169142) which was later identified by SP5 as the set belonging to his wife, the deceased.

[36] According to SP4, the appellant came to Wan Xing Jewellers Store on 6 February 2013, to pawn the said iPhone 4S handphone. It came with a complete set comprising the box, charger and hands free kit (exhs P10A, P10B, P10C and P10D). She paid RM1,000 to the appellant and had issued a receipt (exh P7 at p 35 of *Jld* 3A, *RR*) on the appellant's name and also recorded the said transaction in the register book (exh P8), the relevant page of which is exh P8A, at p 38 of the same *Jilid*.

[37] SP6 further confirmed that the deceased had shown him the said iPhone 4S handphone to him in the morning of the incident.

[38] There is the further evidence of SP13 who had arrested the appellant on 21 February 2013 at Kenanga Apartment in Puchong and recovered from him receipt No 26739 (exh P9, at p 39 of *Jld* 3A, *RR*) issued by Wan Xing Jewellers Store in respect of the pawning of the said iPhone 4S handphone and a red and black coloured LG Chocolate handphone which was also identified by SP5 as belonging to the deceased.

[39] There is also the evidence of the chemist, SP7 (Nor Aidora bt Saedon). Her report is exh P22, at pp 96–104, *Jld* 3A, *RR*. At p 99, the report states that '... a mix DNA profile of two individuals, (one female and one male) was developed from the indicated bloodstains on nail clippings 'X' (labelled 'Goh Chew Peng') (the deceased). The sources represented by the bloodstained 'Y' (labelled 'Goh Chew Peng') and blood sample 'U(i)' (labelled 'Tee Yee Sien') are consistent with being the major and minor contributors respectively to this mixed DNA profile ...'.

[40] The deceased was murdered on 3 February 2013. Her iPhone 4S handphone (exh P10B) was pawned by the appellant to SP4's store on 6 February 2013, barely three days later. This proximity, as decided by the Federal Court in *Amathevelli a/p P Ramasamy v Public Prosecutor* [2009] 2 MLJ 367, would certainly attract the presumption under s 114(a) of the Evidence Act 1950, which provides:

> (a) that a man who is in possession of stolen goods soon after the theft is either the thief or has received the goods knowing them to be stolen, unless he can account for his possession.

[41] In addition, the deceased's LG Chocolate handphone was recovered from the appellant upon the appellant's arrest on 21 February 2013.

[42] In connection with the seizure of these handphones in the aforesaid manner, we were in full agreement with the learned trial judge's findings, evinced at p 36, *Jld* 1, *RR*:

> [42] Similarly, I find here that the fact the accused was in possession of the handphones belonging to the deceased soon after her demised, constitutes sufficient evidence on a prima facie basis to connect the accused to the murder of the deceased in the absence of explanation as to how he had come to be in their possession.

[43] The presence of the appellant's fingerprint ('AO') on the outside of the driver's side door window of the deceased's motorcar and the appellant, being a confirmed co-contributor with the deceased in the mixed DNA profile developed from the indicated bloodstains on the nail clippings of the deceased, shows that the deceased was verily at the scene of the crime, and further raising the irresistible inference and conclusion that the appellant had indeed accosted, engaged and struggled with the deceased and finally ended the deceased's life, before escaping with the deceased's valuables.

[44] In our judgment, the cumulative effect of the circumstantial evidence adduced before the court leads to the irresistible conclusion that it was the appellant who had murdered the deceased. We were satisfied that the proven facts, were consistent with the guilt of the appellant and it had excluded every reasonable explanation other than the guilt of the appellant — see *Jayaraman & Ors v Public Prosecutor* [1982] 2 MLJ 273, *Sunny Ang v Public Prosecutor* [1966] 2 MLJ 195; *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579.

Ground (ii) — Failure to appreciate the difference between mixed DNA profile and full DNA profile

[45] Learned counsel submitted that apart from the appellant's DNA profile and the deceased's which were found in the mixed DNA profile, the DNA

A profiles of two other persons were also developed from the exhibits submitted to the chemist, SP7, to wit:

(a) 'Individual 1'; and

(b) 'Male 1'.

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[46] It was further submitted that SP7 had stated in her oral evidence that for two DNA profiles to be considered as being 'consistent' with each other, there must be at least six genetic loci matching each other's profile.

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[47] It was then submitted that from SP7's report (exh P22), it can be shown that the mixed DNA profile may be considered as also being 'consistent' with the DNA profile of 'Individual 1' with six matching genetic loci located at STR locus CSFIPO, THO1, D16S539, D2S1338, D195433 and vWA.

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[48] It was also submitted that the said mixed DNA profile may also be 'consistent' with the DNA profile of 'Male 1' with ten matching genetic loci located at STR locus D21S11, D7S820, CSFIPO, TH01, D16S539, D2S1338, vWA, TPOX and D5S818.

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[49] Learned counsel further submitted that a mixed DNA profile is less reliable for the purpose of identification of the owner of the DNA profile because of the wide range of possible matches with other DNA profiles having not less than six matching genetic loci. However, there is no indication in the judgment of the learned trial judge that he had considered the infirmity inherent in a mixed DNA profile on account of the above (paras 48–49) for the purpose of implicating the appellant with the commission of the offence nor proffer any reason for rejecting the consistency of the said mixed DNA profile with the DNA profiles of 'Individual 1' and 'Male 1'. This has verily created a reasonable doubt upon the prosecution's case.

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[50] However, we were in disagreement with learned counsel's submission. The evidence showed that the unknown sources of DNA profiles developed from 'Individual 1' and 'Male 1' were not recovered from the scene of the crime nor from the inside or outside the deceased's car and neither from any part of the deceased's person.

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[51] Rather, the evidence indicated that the DNA profiles from 'Individual 1' and 'Male 1' were developed from the bloodstained area found on comforter 'Z' which was seized by the police from the house of the appellant's Indonesian wife.

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[52] Similarly, the DNA profiles of 'Individual 1' and 'Male 1' were also

developed from the blanket that was seized from the house of the appellant's Indonesian wife.

[53] The purpose of the seizure of these two articles was narrated by SP17, the investigating officer, in his examination in chief appearing at p 211, *Jld* 2C, *RR*:

S: Daripada mana selimut dan toto ASP hantar ke Kimia ini dirampas?

A: YA kedua-dua barang kes yang saya hantar itu diperolehi daripada pegawai serbuan Insp. Dasila binti Hanafi yang telah membuat pemeriksaan ke atas sebuah rumah di alamat B-03-06, Apartment Kenanga, Bandar Putra Perdana, Puchong, Selangor. Pemilik rumah ketika itu adalah seorang perempuan Indonesia bernama Darwit Karda, No. Passport AK680414.

S: Berdasarkan siasatan ASP, serbuan ini dibuat di rumah siapa, apa kaitan rumah ini dengan serbuan yang dilakukan ini?

A: Berdasarkan siasatan saya YA serbuan dibuat kerana perempuan Indonesia ini adalah isteri kepada OKT yang bernama Tee Yee Sien.

[54] Hence, in such event we were with the learned deputy public prosecutor's submission that the DNA profiles of 'Individual 1' and 'Male 1' which were developed from the said comforter and blanket has no relevance and weightage at all upon the culpability or otherwise of the appellant in the commission of the offence preferred against him as the said articles were not seized from the crime scene but from the apartment belonging to the appellant's wife.

Ground (iii) — Investigation of the appellant's alibi

[55] At para 75, p 53, *Jld* 1, *RR*, the learned trial judge stated in his judgment:

> Under the circumstances and despite the omission of the police to conduct any or any reasonable investigation as alleged, cannot assist the accused in endeavouring to establish his presence at those places and his alleged meetings with the persons he mentioned. Further, the police cannot be expected to embark on a 'wild goose' chase in checking out all the massage parlours and Thai restaurants in the area and as a result of insufficient information provided by the accused and be faulted for not doing any investigation or for doing shoddy investigation.

[56] Upon such findings, learned counsel submitted that the learned trial judge had misdirected himself because SP17 (the investigating officer) had testified that he had in fact investigated the appellant's story/alibi given in his cautioned statement (exh D87, p 209, *Jld* 3B, *RR*) although it was done

through another officer whose name he cannot now remember.

[57] Learned counsel added that the learned trial judge had further misdirected himself when he failed to invoke s 114(g) of the Evidence Act 1950, against the prosecution on account of its failure to produce the said police officer who had actually conducted the investigation in court. This officer was a material witness who could easily have been subpoenaed to testify and the failure to call this particular officer has left a material gap in the prosecution's case.

[58] It was further submitted that the learned trial judge had misdirected himself when he relied on the evidence of SP17, which is clearly hearsay, in finding that there was no truth in the appellant's version when he has not even heard the evidence of the said officer who actually investigated the appellant's version/alibi.

[59] Now, the evidence overwhelmingly revealed that the appellant was at the scene of crime and had engaged or struggled with the deceased inferred through the presence of his fingerprint impression 'AO' on the outside of the driver's side door window of the deceased's motorcar, the mixed DNA profile found in the deceased's fingernails showing the presence of the appellant's DNA profile as the minor contributor, the fact that the appellant had pawned the deceased iPhone 4S handphone with SP4 soon after the demise of the deceased and the seizure of the deceased's LG Chocolate handphone from the appellant himself. These factual evidence led the learned trial judge to the irresistible conclusion that the murder of the deceased cannot be explained in any other manner than the hypothesis that it was the appellant who had murdered the deceased — (see paras 107–108, pp 68–69, *Jld* 1, *RR* — grounds of judgment).

[60] Hence, the learned trial judge was satisfied beyond reasonable doubt that the appellant had been positively identified, though not in terms of the *Turnbull* guidelines but through circumstantial evidence, as the person involved in the murder of the deceased. We were with him. The appellant was at the scene of crime.

[61] In such event where the learned trial judge had found as a matter of fact that the appellant had been positively identified as the person involved in the killing of the deceased, his alibi defence as mooted in his cautioned statement collapsed. We were fortified in our finding by the following statement of the law by the Federal Court in *Duis Akim & Ors v Public Prosecutor* [2014] 1 MLJ 49 at p 72; [2013] 9 CLJ 692 at pp 719–720:

> [82] However, alibi could not prevail over the positive identification of an accused

person especially so in the face of categorical statements coming from credible witnesses who had no ill motives in testifying.

[83] Thus, in *Mutachi Stephen v Uganda* [2003] UGCA 9 the accused said that on the night the offence took place he was already asleep with his wife. However there was a witness who had positively identified him. As such his alibi collapsed. He has been squarely put at the scene of crime.

[84] Similarly, in the present case it was the finding of the learned trial judge, which we agree, that the appellants had been positively identified by PW1. As such, the alibi defence of the first and second appellants collapsed ...

[85] ...

[86] Accordingly, for the above reasons there is no necessity for us to deal with the alibi defence but merely to consider whether the prosecution had established its case beyond reasonable doubt in order to uphold the convictions of the appellants.

[62] We were of the considered opinion that the aforesaid principles did apply with equal force to the present appeal before us although no formal notice of alibi was tendered in court but mooted through the appellant's cautioned statement and that the identification of the appellant was made not through the evidence of eye witnesses but through the combined strength of circumstantial evidence upon which the appellant has been squarely put at the scene of crime.

[63] Thus, following the above said authority, there is no need for us to consider the appellant's version/alibi as contained in his cautioned statement that he was not at the scene of crime at the time of the deceased's murder but elsewhere. What is left to be considered is whether the prosecution had established its case beyond reasonable doubt in order to sustain the conviction of the appellant.

[64] Hence, to recapitulate, the appellant testified that soon after his arrest, he had informed the police as to his whereabouts on the day of the incident. He said that on that day (3 February 2012) he was at home from the time he woke up at about 11.30am. After going out to buy vegetables at about 1pm he returned home and stayed at home until about 8.30pm. At around 8.30pm he left his house to meet a friend, Ah Meng, at a massage parlour in Pinggiran Putra. He arrived at Pinggiran Putra at about 9pm and met with Ah Meng for about 15 minutes. Then he went to Jalan Alor in the Bukit Bintang area in Kuala Lumpur to sell alcoholic medicinal drinks to a Thai Lady, one 'Pi'. After that he had a meal in a Thai restaurant. He said he was there until about 11.30pm after which he went home.

[65] However, the learned trial judge rejected the appellant's version of the event and gave his full grounds for so doing as indicated at paras 66–71 at

pp 50–52 of *Jld* 1, *RR*. We did not find it necessary to regurgitate its contents herein but wished to express our full agreement with his grounds, analysis and findings thereof. Finally, in the following paragraphs the learned trial judge stated:

> [72] From the above analysis, it appears that the accused was unable to descend into important specifics regarding the version he told the police. The most noticeable of these were that he was unable to provide the full name and other descriptions of Ah Meng whom he had claimed to have met many times before. He also was unable to give the name of the massage parlour. He was also unable to give a description of Pi and the name of the Thai restaurant although he claimed to have eaten there often.
>
> [73] ...
>
> [74] I find that the accused had provided insufficient details to the police to expect them to carry out meaningful investigation regarding the version given by him. Notwithstanding the contention of the accused that there were only so many massage parlours and Thai restaurants in the particular areas he mentioned, it defies reason that the accused was unable to furnish what would be considered reasonable details and description of the personalities and the establishments mentioned if indeed he was well acquainted with them.

[66] Again, we were in full agreement with the findings expressed therein which is most instructive rendering it unnecessary for us to add anything more to it.

[67] In addition, the appellant had failed to account the presence of his DNA in the mixed DNA profile developed from the bloodstains under the fingernails of the deceased.

[68] Equally, the appellant had also failed to explain as to how his fingerprint could be imprinted on the driver's side window of the deceased's motorcar.

[69] The appellant's evidence of how he came into possession of the deceased's iPhone 4S and LG Chocolate handphones also cannot be supported by any credible evidence. He claimed to have purchased the two handphones from a male Malay on 5 February 2012 when he was having dinner at Pinggiran Putra for RM700 after meeting Ah Meng at a massage parlour which he claimed had gone for many times and yet he was unable to give details of the massage parlour and its whereabouts.

[70] In addition this was also not mentioned in his cautioned statement. Further, if he has all the money in the world to purchase the two handphones, why the need then to pawn one of the handphones with SP4?

[71] The appellant also failed to provide details of 'Pi' whom he also claimed

to have met that night or the name of the restaurant that he had his meal after meeting 'Pi'.

[72] At the end of the day, we were with the learned trial judge's findings that Ah Meng, Pi and the male Malay did not exist and was invented by the appellant to show that he was not at the scene of crime at the material time.

[73] The appellant's defence did not also cast any reasonable doubt upon the prosecution's case. The pieces of evidence when combined together lead only to the irresistible conclusion that the murder of the deceased was committed by the appellant. The prosecution had indeed proved its case beyond reasonable doubt.

Ground (iv) — The oral evidence of SP18, the fingerprint expert was contradicted by his own written report (exh D52)

[74] SP18's fingerprint report (exh D52) dated 16 February 2012 issued pursuant to s 399(1) of the Criminal Procedure Code ('the CPC'), was tendered by the defence during the prosecution's case when the prosecuting counsel indicated that he did not wish to call SP18 to testify.

[75] Paragraph 2.1 of exh D52 states that no fingerprint comparison could be carried out in respect of fingerprint marked as 'AO' because it contained insufficient characteristics for such purpose.

[76] Now, learned counsel submitted that after it had clearly emerged from the cross-examination of SP17 on 10 February 2015 that there was no fingerprint evidence against the appellant as shown in D52, the prosecution made a U-turn and called SP18 to testify on 17 April 2015 for the specific purpose of contradicting the fingerprint report made by SP18 himself.

[77] It was further submitted that it is unfair, prejudicial and out of order for the prosecution to call SP18 in such circumstances and SP18's oral evidence on the said fingerprint 'AO' on 17 April 2015 in which he positively stated that the fingerprint 'AO' actually contained sufficient characteristics for comparison purposes and that he was able to carry out a comparison exercise over the same and had successfully matched with the right forefinger of the appellant, was a fabrication and an afterthought, created long after the trial had commenced in October 2014 and therefore inadmissible in evidence.

[78] In the first place, we opined that there is no rule or regulation to prevent the prosecution to call SP18 to testify in such circumstances. It is the sole prerogative of the prosecution to present its case and evidence in the manner it considered fit. It is equally the sole discretion of the prosecution on how to

arrange the calling of its witnesses and the production of the documents deemed relevant to prove its case. It is also the sole discretion of the prosecution to pick which witness to testify or not to testify so long as it is not motivated by ulterior motive or malice or the involvement of the elements of suppression of evidence. The prosecution is also entitled to 'repair' its case as the trial progressed. It is apparent that in the appeal before us, there is no such suppression of evidence. The exh D52 was freely made available to the defence and the defence had made full advantage of the same to advance the appellant's case.

[79] Now, let us examine what SP18 had to say about the anomaly in his report D52. His full explanation is in his written statement at paras 4, 5 and 6 at pp 191–192, *Jld* 3B, *RR*:

> 4. Walaupun begitu terdapat kesilapan menaip (Typo) di mana saya telah mengatakan kesan yang bertanda Seri Kembangan Rpt 1354/12 (AO) tidak boleh dibuat perbandingan kerana tidak cukup sifat pada surat saya bertarikh 16 Februari 2012. Sebetulnya kesan cap jari yang bertanda Seri Kembangan Rpt 1354/12 (AO) adalah cukup sifat dan telah dibuat perbandingan dengan rekod jenayah di Pusat ini yang mana keputusannya adalah tidak dikesan dengan rekod jenayah di Pusat ini.
>
> 5. Pada 29 Februari 2012, berdasarkan rekod, pejabat saya telah menerima rakaman cap jari yang dihantar secara elektronik (online system) iaitu Borang Cap jari RJ 2C di atas nama Tee Yee Sien, KPT No 791027-04-5297. Walau bagaimanapun tiada sebarang pemberitahuan ataupun pemakluman berkenaan dengan perkara ini kepada pihak saya. Disebabkan itu, tiada sebarang pemeriksaan dan perbandingan kesan-kesan cap-cap jari yang telah dihantar oleh pihak Insp Mazli bin Jusoh dengan kesan cap jari pada Borang Cap Jari RJ 2C tersebut dilakukan oleh saya.
>
> 6. Sehinggalah pada 1 April 2015, saya telah menerima sapina berkaitan kes ini dari Mahkamah Tinggi Selangor untuk hadir sebagai saksi. Adalah menjadi kebiasaan, saya akan menyemak kerja-kerja saya berkaitan kes yang disapina bagi persediaan ke mahkamah nanti. Pada ketika ini barulah saya menyedari bahawa terdapat Barong cap jari RJ 2C di atas nama Tee Yee Sien telah dihantar kepada pejabat saya secara online pada 29 Februari 2012 tersebut. Saya seterusnya telah membuat pemeriksaan dan perbandingan semula dengan kesan-kesan cap-cap jari yang telah dihantar oleh pihak Insp Mazli bin Jusoh dengan Borang Cap Jari RJ 2C atas nama Tee Yee Sien tersebut dan saya dapati:
>
> > 6.1 ...
> >
> > 6.2 ...
> >
> > 6.3 Kesan yang bertanda Seri Kembangan Rpt 1354/12 (AO) adalah serupa cap jari telunjuk kanan pada Borang Cap Jari RJ 2C di atas nama Tee Yee Sien, KPT No: 791027-04-5297.

[80] We were of the view that the explanation offered by SP18 appeared most reasonable. Such mistake could happen to any witness, even with tons of

experience. We have no cogent reason to reject the same. Hence his explanation ought to be accepted to explain the anomaly in his report D52.

[81] The learned trial judge apparently had accepted SP18's explanation as seen at para 39 of his judgment (p 31, *Jld* 1, *RR*) where he found as a fact that the fingerprint imprint ('AO') lifted from the outside of the window of the driver's side window of the deceased's motorcar matched with the fingerprints of the appellant. This finding is a matter within the exclusive domain of the trier of fact, ie the trial judge, who had the audio visual advantage of seeing and hearing the relevant witness ('SP18') testifying before him to assist him to come to a definitive finding. Therefore, the findings of the trier of fact ought to be given its outmost respect and is not to be taken lightly.

[82] Hence, we found the issues raised in connection of the same verily bears no merit.

Ground (v) — Whether the injuries, though fatal, would in the ordinary course of nature sufficient to cause the death of the deceased

[83] It was submitted that the learned trial judge's finding at para 45, p 39, *Jld* 1, *RR*, of his judgment that the prosecution has proven that the injuries inflicted were of a kind that was sufficient in the ordinary course of nature to cause death was devoid of any basis because although the pathologist, ('SP16'), said the injuries sustained were fatal, he did not say in his oral evidence that the injuries were sufficient in the ordinary cause of nature to cause death.

[84] It was further submitted that the failure by the pathologist to state so is fatal to the prosecution's case as the learned trial judge had relied on s 300(c) of the Penal Code to find the appellant guilty of murdering the deceased. Learned counsel relied on *Cheong Kam Kuen v Public Prosecutor* [2013] 1 MLJ 15; [2013] 2 MLRA 1 to fortify his proposition.

[85] The learned deputy public prosecutor ('DPP') countered that the pathologist had said in his witness statement, exh P74 (at p 175, *Jld* 3B, *RR*) that '... hasil tikaman sedalam 3cm ini telah menembusi otot leher dan memotong saluran darah utama leher dan menyebabkan pendarahan yang parah. Luka ini adalah bersifat *fatal ini nature*'. According to the learned DPP, these evidence is sufficient to meet the requirement of s 300(c) of the Penal Code ('the PC').

[86] Learned counsel reiterated that such statement is insufficient as there is nothing before the court to indicate that the said injuries inflicted upon the deceased is sufficient in the ordinary course of nature to cause death.

[87] Now, the pathologist testified that he found 31 marks of injuries on the deceased. The details are as shown in his post mortem report (at pp 176 and 182, *Jld* 3B, *RR*).

[88] The pathologist also said in his written statement (at p 174, *Jld* 3B, *RR*) that:

> Terdapat beberapa kecederaan dijumpai ketika pemeriksaan luaran jasad yang saya nyata secara terperinci dalam laporan bedah siasat. Jenis-jenis kecederaan adalah seperti berikut:
>
> 1. Satu luka tikam di leher kiri dan satu luka tikam di tangan kanan. Luka-luka tikam mempunyai satu hujung yang tajam dan satu hujung yang tumpul.
> 2. Beberapa luka lecet di tepi mata kiri, hidung, bibir, tangan kanan, tangan kiri dan abdomen kiri.
> 3. Beberapa luka hiris di tangan kanan dan kiri.
> 4. Beberapa luka lebam di kelopak mata kiri, rahang, leher, tangan kanan dan kiri, kaki kanan dan kiri.
> 5. Luka lebam bercorak di leher.
>
> Pemeriksaan bedah siasat dalaman pula menunjukkan beberapa pendarahan pada kulit kepala, kulit dalaman leher dan otot-otot leher. Satu salur darah utama leher kiri telah putus terpotong manakala tulang rawan tiroid dan tulang sendi hiyod leher kiri turut patah ...
>
> *Kesimpulan Dari Fakta-fakta Bedah Siasat*
>
> Luka tikam di leher kiri terhasil akibat tikaman satu objek yang hujungnya runcing dan mempunyai bilah yang sebelah tajam manakala sebelah lagi tumpul. Contoh objek sebegini adalah seperti pisau. Hasil tikaman se dalam 30 cm ini telah menembusi otot leher dan memotong salur darah utama leher dan menyebabkan pendarahan yang parah. Luka ini adalah bersifat fatal in nature. Di bahagian leher juga terdapat luka-luka lebam dan bintik-bintik pendarahan petechiae di muka dan kelopak mata yang bersesuaian dihasilkan akibat tekanan yang kuat seperti cekikan, jerutan, hentakan dan seumpamanya di bahagian leher. Tekanan ini telah menutup salur pernafasan dan salur darah utama dan seterusnya menyebabkan kegagalan fungsi jantung dan paru-paru. Kesan tekanan turut mematahkan tulang rawan tiroid dan tulang Lyoid leher. Keadaan ini juga boleh membawa kepada kematian.
>
> ...
>
> Luka-luka hiris, tikam dan lebam di anggota tangan dan kaki terhasil ketika pergelutan dan boleh dikategorikan sebagai luka mempertahankan diri ...

[89] The pathologist opined that the cause of death was stab wound and compression to the neck.

[90] The evidence from the pathologist revealed that the appellant had not only stabbed the deceased on her left neck but had also applied great force or pressure or compression to the neck area the like of 'cekikan', 'jerutan', 'hentakan' and other acts of the like nature.

[91] The stab wound caused to the left neck of the deceased which was 3cm in depth had penetrated the underlying subcutaneous tissues, cutting through the sternocleidomastoid muscle and transacted the internal jugular vein of the neck and causing severe bleeding. This injury is fatal in nature as testified by the pathologist.

[92] Meanwhile, the great pressure/compression applied to the neck area of the deceased had closed the air vent ('salur pernafasan') and the main vein and had further occasioned the functional failures of the heart and lungs.

[93] The said pressure/compression had also caused the fractures of the superior horn of left thyroid cartilage and the joint of the left greater horn body of hyoid bone. According to the pathologist, these injuries could also cause death.

[94] The pathologist's post mortem report further stated at para 7 p 182 of *Jld* 3B, *RR*:

> She died from external blood exsanguination in association with cardio respiratory insufficiency due to stab wound and compression to the neck area respectively.

[95] Hence, what can now be gathered and inferred from the acts of the appellant in causing the stab wound by using a lethal weapon that was fatal in nature and applying great pressure or compression on the deceased's neck area that had caused the deceased to suffer from cardio respiratory insufficiency?

[96] In our view, such acts by the appellant indicated that the appellant had no other intention but an intention to murder the deceased, an act which is well within the ambit of limb (a) of s 300 of the PC and not under limb (c) of the same section as found by the learned trial judge. Apparently, the learned trial judge had not considered that the appellant, apart from stabbing the deceased, had also, in words of the pathologist, applied great pressure/compression like 'cekikan', 'jerutan' and 'hentakan' on the neck area of the deceased of which these acts are intentional in nature and was in fact one of the causative factors contributing to the death of the deceased.

[97] Verily, the intention of the appellant can be inferred from what he did in the absence of an express admission. Thomson CJ had stated in *Tan Buck Tee v Public Prosecutor* [1961] 1 MLJ 176 at p 179:

A There was the body with five appalling wounds on it, wounds penetrating to the heart and liver, which must have been caused by violent blows with a heavy sharp instrument like an axe. In the absence of anything else, whoever inflicted those blows must have intended to kill the person on whom they were inflicted.

B **[98]** Likewise, the acts of the appellant before us falls squarely within the ambit of above said dictum.

[99] This appeal before us is a continuation of proceedings through the rehearing of the evidence adduced before the trial court. Hence, this court in its C appellate capacity, has all the powers to review or re-evaluate all the evidence available as adduced by the prosecution and in a case involving purely a question of fact, this court is free to determine whether or not the various findings of the trial court are correct and thence come to its own findings — see D *Ahmad Najib bin Aris v Public Prosecutor* [2009] 2 MLJ 613; [2009] 2 CLJ 800; *Mohamed Mokhtar v Public Prosecutor* [1972] 1 MLJ 122; *Public Prosecutor v Azilah bin Hadri & Anor* [2015] 1 MLJ 617; [2015] 1 CLJ 579 and s 60 of the Courts of Judicature Act 1964.

E **[100]** Hence, having reviewed and re-evaluated the evidence adduced, we have no hesitation to depart from the findings of the learned trial judge. Consequently we substituted the said learned trial judge's finding that the appellant had committed the murder of the deceased under limb (c) of s 300 of the PC to one under limb (a) of the same provision.

F

[101] No party, in particular the appellant, would suffer any prejudice. This is because the prosecution still has to carry the same burden of proving its case irrespective of under which limb of s 300 of the PC the appellant had been G found to have committed the murder. Likewise, the evidential burden upon the defence is still the same irrespective of under which limb of s 300 of the PC the appellant had been found guilty, ie, to raise a reasonable doubt upon the case as presented by the prosecution.

H **[102]** Having considered the evidence in its entirety, we were satisfied that the defence had failed to raise a reasonable doubt on the prosecution's case, and likewise, we were satisfied that the prosecution had proven its case beyond a reasonable doubt.

I CONCLUSION

[103] Verily, we found no merit in the appellant's appeal. Henceforth, we dismissed his appeal and affirmed the conviction and sentence handed down by the High Court.

Appeal dismissed.

Reported by Afiq Mohamad Noor